PUNCAK NIAGA (M) SDN BHD

v.

CGE UTILITIES (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[CIVIL SUIT NO: S6-22-840-1999]
31 MAY 2001

CIVIL PROCEDURE: *Injunction - Serious questions to be tried - Sufficient monetary compensation - Balance of convenience*

CIVIL PROCEDURE: *Injunction - Application for - Whether application should be confined to prayers therein*

The plaintiff as the concessionaire for the supply of water for Selangor and the Federal Territory of Kuala Lumpur appointed Mandai Sari Sdn Bhd ('Mandai Sari') to oversee the operation and maintenance of the facilities and jointly sub-contracted the same to the defendant. Security being of the essence, the plaintiff and the defendant established a joint venture company called Fleet Avenue Sdn Bhd ('FASB') to provide security services for the security area. As FASB was unable to procure the security licence, the plaintiff undertook to provide the said security services with the blessings of the defendant. The defendant then sought to appoint a third party to provide the necessary security services. Thus this application by the plaintiff for an order of injunction to restrain the defendant from doing so.

Held:

[1] Bearing in mind the grave consequences should there be a breach of security, it was pertinent that management and manning of the security area be categorically confined to responsible locals as to do otherwise would be contrary to public interest and national security. The fact that the plaintiff was the appointed concessionaire underlines the absolute trust placed on it by the Government. It was imperative that the manning of the security area lay with the plaintiff. (p 38 d-g)

[2] The hearing of this application for injunction should be confined solely to the prayers as per the summons in chambers only. The plaintiff's prayers therein were clearly worded, *ie*, seeking an injunction to prevent the defendant from appointing any third party to be awarded the job of security services for the security area. The court did not agree with the

defendant's submission that the plaintiff was in fact seeking an order that it be appointed to provide the security services. That was because the plaintiff did not pray for it in this application. (pp 38 h & 39 a-c)

[3] Applying the principles laid down in *American Cyanamid Co v. Ethicon*: (i) the issues as to whether security management had been in reality delegated to Mandai Sari and subsequently to the defendant (bearing in mind the omission of the word "management" from the agreement) and whether by its conduct the defendant had relinquished its rights and control over the same and was therefore estopped from claiming otherwise, created serious questions to be tried in the instant case; (ii) it was apparent that the defendant could be sufficiently compensated monetarily in the event of the defendant's success at the full hearing of the suit; and (iii) the fact that the plaintiff had been successfully providing efficient security services since 1994 without any complaint from the relevant authorities unquestionably tilted the balance of convenience in favour of the plaintiff. (pp 39 g-i & 40 a-b)

[Plaintiff's application allowed with costs.]

Case(s) referred to:

American Cyanamid Co v. Ethicon [1975] 2 WLR 316 ***(foll)***

Perumahan Farlim (Pg) Sdn Bhd v. Cheng Hang Guan & Ors [1989] 2 CLJ 967; [1989] 1 CLJ (Rep) 127 ***(foll)***

Roxy Electric Industries (M) Bhd v. Syarikat Nominee Bumiputra Sdn Bhd [1989] 2 CLJ 657; [1989] 2 CLJ (Rep) 414 ***(foll)***

For the plaintiff - Zamani Ibrahim (Fozi Zain); M/s Fozi Zain & Partners

For the defendant - David Morais (Ramit Kaur); M/s Kim & Partners

Reported by K Ganesh

JUDGMENT

Azmel Maamor J:

In September 1994 the plaintiff was awarded by the State Government of Selangor a concession for the supply of water for the entire area of the State of Selangor as well as the Federal Territory of Kuala Lumpur. This means the plaintiff was taking over the responsibilities of the operation, maintenance and management of the 27 water treatment plants and dams that was previously the responsibilities of the Jabatan Bekalan Air Selangor. In order to discharge part of the responsibilities the plaintiff appointed Mandai Sari Sdn. Bhd. to take care of the operation and maintenance of the facilities. This was contained in the operation and maintenance agreement dated 8 October 1994 between the plaintiff and Mandai Sari Sdn. Bhd. In turn the plaintiff and Mandai Sari

sub-contracted the said work to the defendant. This is contained in the operation and maintenance sub-contract agreement dated 31 August 1995 between the plaintiff, Mandai Sari and the defendant.

Realising the importance of the supply of water to the whole area of the State of Selangor and the Federal Territory of Kuala Lumpur in which are located high powered establishments the security of the 27 water treatment plants and dams becomes very crucial indeed. This is specifically provided in para. 26 of the PCCA. It reads:

> **26 SECURITY**
>
> The Concessionaire shall as soon as possible after the Commencement Date erect as part of the Refurbishment Works maintain adequate fencing around the existing water treatment facilities and as such other part or parts of the works in accordance with gazetted requirements of the Federal Government as a security area or as shall be deemed necessary (herein is referred to as "Security Area") and shall for the duration of the Concession Period provide and maintain maximum security over the Security Area provided always that the Government shall render and provide all necessary assistance to the Concessionaire in maintaining security over the Security Area in times of Civil disturbance, riots and/or terrorists or attacks.

For the purpose of the said security management, the plaintiff and defendant established a joint venture company called Fleet Avenue Sdn. Bhd. (FASB). In this joint venture company the plaintiff has 70% shares and the defendant 30% shares. The company has five directors, three from the plaintiff's nominees and two from the defendant. The joint venture agreement was executed on 21 October 1996. Unfortunately FASB till today has not been able to obtain the security licence as required under the Private Agencies Act 1971. As such FASB could not provide the security services. Because of the inability of FASB to do so the plaintiff took it upon itself to provide the security services for the Security Area since 1994. The defendant did not raise any objection or attempted to prevent the plaintiff from doing so.

Quite recently, realising that FASB is unable to provide the security services for the reasons as stated above the defendant decided to appoint a third party to provide the required security services. It was this very action of the defendant that the plaintiff is now seeking for an order of injunction with a view to prevent the defendant from appointing the 3rd party to provide the security services over the Security Area.

The plaintiff furnished two main reasons in making the application. Firstly, the plaintiff contended that in appointing Mandai Sari Sdn. Bhd. and subsequently appointing the defendant the works that were assigned to Mandai

Sari and subsequently the defendant were only confined to operation and maintenance. The word management was intentionally omitted. As such security services which form part of management was not intended to be included to be passed to the defendant. Therefore the task for providing security service still remains with the plaintiff. Secondly, even if the security services had been passed to the defendant in accordance with the terms of the sub-contract agreement and subsequently delegated to the defendant, the defendant, through their conduct, had relinquished their rights and control over the same.

In response to that the defendant strenuously argued that the security services over the Security Area had been delegated to them under the terms of the sub-contract agreement.

After having carefully considered this matter I held the view that the management of the security of the said Security Area is of the utmost importance because any sabotage to the water treatment plants and dams would seriously affect water supply to the entire Klang Valley area in which are situated various important organs of the Government of Malaysia as well as that of the State of Selangor. In the light of such importance, I was of the view that the manning of such security services has to be executed by responsible locals. It would be contrary to national security to leave such serious responsibility to foreigners.

Paragraph 26 of the PCCA categorically states that the responsibility of managing the security of the Security Area lies with the plaintiff. The fact that the plaintiff had been awarded the concession to supply water to the whole area of Selangor and Kuala Lumpur indicates that the plaintiff is a person whom the Government has placed complete trust. In so far as the Government is concerned the security of the Security Area shall always lie with the plaintiff. In the event that the plaintiff wishes to delegate the responsibility of manning the security services to any other person it would be crucial for the plaintiff to be completely sure that responsible and capable persons are appointed to do the job so that no disaster involving supply of water should occur. In my view, from the point of national security and public interest the responsibility to man the security services of the Security Area should remain with responsible locals.

Coming back to the plaintiff's application, seeking for an order of injunction to prevent the defendant from appointing anybody for the security services of the Security Area, it may be pertinent for me, at this juncture, to touch on the contention of the counsel for the defendant in stating in his submission, that the injunction sought by the plaintiff is mandatory. It was his submission that the plaintiff was really seeking an order that it be appointed to provide

security services in the Security Area. This prayer appears in the statement of claim but does not appear in this saman dalam kamar. With respect, I am unable to agree with the contention of the counsel for the defendant. The plaintiff's prayers as stated in the saman dalam kamar (encl. 2) are very clearly worded ie, seeking an injunction to prevent the defendant from appointing any third party to be awarded the job of security services for the Security Area. The question of the plaintiff asking for an order to be appointed to provide security services does not arise because the plaintiff is not praying for it in this application. Furthermore the plaintiff is **currently** providing the security services to the Security Area. In my view arguments by parties in this application should be confined to the prayers sought in the **saman dalam kamar** only. Whatever other prayers further sought by the plaintiff in the statement of claim should be a matter to be argued at a later hearing. This application for injunction is interlocutory in nature. It is not a final order. As such decision to be made in an interlocutory matter may not necessarily be the same as in a matter which seeks final order. The case on point on this issue is *Perumahan Farlim (Pg) Sdn. Bhd. v. Cheng Hang Guan & Ors.* [1989] 2 CLJ 967; [1989] 1 CLJ (Rep) 127 CJ said:

> The object of an interlocutory interim injunction is to preserve matters in *status quo* until the case is tried. Such an injunction is therefore usually so framed as to continue in force until the hearing of the cause or until further order. It cannot be considered in argument as affecting the ultimate decision of a cause.

Coming back to the plaintiff's application, the principles that had been laid down in the *American Cyanamid Co. v. Ethicon* [1975] 2 WLR 316 has been adopted and applied locally. This was stated by Zakaria Yatim J (as he then was) in the case of *Roxy Electric Industries (M) Bhd. v. Syarikat Nominee Bumiputra Sdn. Bhd.* [1989] 2 CLJ 657; [1989] 2 CLJ (Rep) 414 said:

> In the *American Cyanamid* case the first question to be considered was whether there was a serious question to be tried. Secondly, whether a party could be adequately compensated and thirdly, the question of balance of convenience.

Applying the principles of the *American Cyanamid* case to this case, I am of the view that there are serious questions to be tried in this case. The first issue is whether in fact security management had been delegated to Mandai Sari Sdn. Bhd. and subsequently to the defendant having regard to the fact that the word **"management"** had been omitted in the agreement. Secondly, whether by the acts of the defendant allowing the plaintiff to provide security services the doctrine of estoppel can be invoked by the plaintiff against the defendant. As to the second test I am sure the defendant could be well compensated in monetary terms in the event that the defendant were to succeed at the full hearing of the suit. Thirdly on the question of balance of

convenience, I am of the view that since the plaintiff had been providing the security services since 1994 and that job had been successfully carried out without any complaint from the State Authorities it would only be proper that the plaintiff should continue to do so having regard to the fact that the management of security services over the Security Areas is of utmost importance. The balance of convenience tilts very much in favour of allowing the plaintiff to continue giving such security services.

For the reasons as I have stated above I allowed the plaintiff's application with costs in the cause.